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**BEFORE THE**
**FEDERAL COMMUNICATIONS COMMISSION**
**Washington D.C. 20554**

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| In the Matter of<br><br>Federal-State Joint Board on<br>Universal Service | ) | CC Docket No. 96-45 |

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Federal Communications Commission
Office of the Secretary

**PETITION FOR FORBEARANCE OF**
**VIRGIN MOBILE USA, L.P.**


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## SUMMARY

*Virgin Mobile USA, L.P. ("Virgin Mobile") is seeking forbearance from section* 214(e)(1)(A) of the Communications Act of 1934, as amended ("Act"), which requires a common carrier designated as an eligible telecommunications carrier ("ETC") to offer services supported by the universal service fund ("USF") over its own facilities or a combination of its own facilities and the resale of another carrier's services. Virgin Mobile requests forbearance from the section 214(e)(1)(A) facilities requirements since it is a reseller of commercial mobile radio services ("CMRS") and is concurrently applying for designation as an ETC in New York, Pennsylvania, and Virginia solely for purposes of participation in the USF's Lifeline/Link-Up program.

Virgin Mobile's Petition for Forbearance satisfies the Commission's forbearance standard since enforcement of section 214(e)(1)(A) is not necessary to ensure that Virgin Mobile's rates are just and reasonable and non-discriminatory. In the robustly competitive wireless market, Virgin Mobile competes against a host of other carriers, including prepaid and postpaid providers, to offer customers the lowest priced and highest quality services. This competition ensures that Virgin Mobile offers its customers just, reasonable, and non-discriminatory rates and terms.

Second, enforcement of the facilities requirement contained in section 214(e)(1)(A) is not necessary to protect consumers. In fact, forbearance actually will provide significant benefits to consumers, especially low-income consumers, by increasing their alternatives for affordable and comparable wireless telecommunications services. Forbearance will further one of the primary goals of the Act by providing low-income consumers with enhanced access to telecommunications services. Grant of forbearance, moreover, will not unduly burden the USF

or otherwise reduce the funding available to other ETCs, especially since Virgin Mobile is seeking forbearance to allow designation as an ETC solely for participation in the Lifeline/Link-Up program.

Forbearance also is in the public interest since it will permit Virgin Mobile to provide discounted telecommunications services to qualifying low-income customers—many of whom are the intended beneficiaries of USF support. Many low-income consumers have yet to benefit from the array of competitive alternatives available in the marketplace because of financial constraints, poor credit history, or intermittent employment. Virgin Mobile's prepaid service offerings are ideally suited to provide these customers with reliable and cost-effective wireless services. Grant of forbearance, therefore, will enable Virgin Mobile to expand the availability of affordable telecommunications services to these consumers, enhancing choice and lowering prices.

Finally, Virgin Mobile's request for forbearance is consistent with prior Commission precedent that granted Tracfone Wireless, Inc. ("Tracfone"), a reseller of CMRS services, with forbearance from the section 214(e)(1)(A) facilities requirement. In its 2005 decision granting forbearance to Tracfone, the Commission determined that the facilities-based requirement impedes greater utilization of the USF's low-income program by wireless resellers. The Commission further reasoned that the increased availability of prepaid wireless services would significantly benefit low-income consumers who are especially concerned about high usage charges and long-term contracts. For similar reasons, grant of forbearance to Virgin Mobile from enforcement of section 214(e)(1)(A) will benefit consumers, especially low-income consumers.

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## PETITION FOR FORBEARANCE

### I. INTRODUCTION

Virgin Mobile USA, L.P. ("Virgin Mobile"), pursuant to Section 10 of the Communications Act of 1934, as amended ("Act"),[1] hereby petitions the Federal Communications Commission ("FCC" or "Commission") to forbear from enforcement of section 214(e)(1)(A) of the Act requiring a common carrier designated as an eligible telecommunications carrier ("ETC") to offer services supported by the universal service fund ("USF") over its own facilities or a combination of its own facilities and the resale of another carrier's services.[2] Virgin Mobile's request for forbearance satisfies the requirements of Section 10(a) of the Act and accords with recent Commission precedent since it seeks forbearance from the requirements of section 214(e)(1)(A) only for purposes of participation in the USF's Lifeline/Link-Up program. As discussed below, grant of forbearance would enable Virgin Mobile to advance the deployment of discounted telecommunications services, greatly benefiting its low-income

1 *See* 47 U.S.C. § 151 *et seq.*

2 *See* 47 U.S.C. § 214(e)(1)(A).

customers. Prompt Commission action also will ensure that Virgin Mobile expeditiously deploys its services to the many low-income consumers that currently lack access to comparable and affordable telecommunications services.

## II. BACKGROUND

### A. Virgin Mobile Overview

Virgin Mobile was established as a joint venture between Sprint Nextel and Sir Richard Branson's Virgin Group. Sprint Nextel provides the nationwide wireless backbone for Virgin Mobile's service, including all network infrastructure and wireless transmission facilities. Virgin Mobile purchases wireless network services on a wholesale basis at a price based on Sprint Nextel's cost of providing these services plus a specified margin. As a Mobile Virtual Network Operator ("MVNO"), Virgin Mobile manages and markets all aspects of the customer experience, including pricing, website, handset selection, service offers, entertainment applications and marketing materials. Virgin Mobile's simple and straightforward pay-as-you-go, or prepaid, pricing, along with its differentiated service offerings and high-quality customer service, have redefined the prepaid wireless marketplace and brought significant competition to the overall wireless market. Virgin Mobile's value proposition enables customers to select among an array of flexible service plans that allow them to pay for minutes as they use them or purchase monthly buckets of minutes in advance.

Unlike many carriers, Virgin Mobile does not impose credit checks or long-term service contracts as a prerequisite to obtaining service. Many Virgin Mobile customers are from lower-income backgrounds and did not previously enjoy access to an attractive, comprehensive and high-quality wireless service because of financial constraints or poor credit history. Virgin Mobile estimates that approximately one-third of its present customers are new to wireless services and 35 percent have an annual household income below $35,000. Many of these customers also use Virgin Mobile's services sparingly, with a substantial percentage spending less than $10 per month. Without question, prepaid wireless services have become essential for lower-income customers, providing them with value for their money, access to emergency services on wireless devices, and a reliable means of contact for prospective employers or social service agencies.[3] By marketing and expanding the availability of appealing wireless services to consumers otherwise unable to afford them, and those previously ignored by traditional carriers, Virgin Mobile has effectively expanded access to wireless services. Indeed, many of Virgin Mobile's customers are among those whom the USF was designed to benefit.

B. Lifeline/Link-Up Program

Universal service has been a fundamental component of U.S. telecommunications policy since adoption of the Act over 70 years ago. Section 254 of the Act embodies the Commission's historical commitment to the concept of universal service, especially for low-income consumers. Section 254(b) designates the principles upon which the Commission shall base its policies for the promotion and advancement of universal service. These principles require the Commission to ensure that all consumers, including low-income consumers, have access to telecommunications services at comparable and affordable rates.[4] The low-income program is one of several USF support mechanisms that furthers the goals contained in section 254. A component of the USF's low-income program, Lifeline support is designed to reduce the monthly cost of telecommunications services for lower-income consumers by providing them

3 Indeed, a recent aggregate survey of Virgin Mobile customer usage patterns indicated that state and city welfare agencies are among the most frequently contacted by customers.

4 47 U.S.C. § 254. Section 254(b)(3) requires the Commission to determine whether "consumers in all regions of the Nation, *including low-income consumers* and those in rural, insular, and high cost areas … have access to telecommunications [services] …." [*emphasis added*] 47 U.S.C. § 254(b)(3).

with significant discounts for service—with greater discounts available for individuals living on tribal lands. Link-Up provides qualifying low-income consumers with discounts for initial activation costs.

The Commission has credited this program for gradually increasing telephone penetration rates, especially among low-income consumers. Despite the steady rise in penetration rates, however, the FCC has noted that "there is more that we can do to make telephone service affordable for more low-income households" and recently targeted the low Lifeline/Link-Up participation rate as one area for improvement.[5] Indeed, Commission concerns regarding the underutilization of this program have existed since its inception.[6] To increase awareness of the program, the Commission has recently expanded the qualifying criteria and adopted broader outreach guidelines requiring carriers to better advertise the availability of Lifeline/Link-Up services. Through these actions, the Commission has sought to increase participation in the USF's low-income program because "improve[d] participation in the Lifeline/Link-Up program ...would increase telephone subscribership and/or make rates more affordable for low-income households."[7]

The Act provides that only an ETC shall be eligible to receive funding from the USF, including the Lifeline/Link-Up program. Section 214(e)(1)(A) of the Act provides that a carrier designated as an ETC shall offer the services supported by the USF by using either its own

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5 *See In the Matter of Lifeline and Link-Up*, Report and Order and Further Notice of Proposed Rulemaking, 19 FCC Rcd 8302, 8305 (2004)("*Lifeline/Link-Up Order*"). According to the Commission's own statistics, only one-third of households eligible for assistance actually participated in the Lifeline/Link-Up program just a few years ago. *See id.*

6 *See Federal-State Joint Board on Universal Service*, Report and Order, 12 FCC Rcd 8776, 8972 (1997)("*1997 Order*").

7 *See Lifeline/Link-Up Order* at 8312.

facilities or a combination of its own facilities and the resale of another carrier's services.[8] In its 1997 Order implementing section 254, the Commission determined that it would be inappropriate to designate pure resellers as ETCs since these entities "receive the benefit of universal service support by purchasing wholesale services at a price that already includes the universal service support payment" obtained by the underlying facilities-based provider.[9] The Commission concluded, therefore, that denial of ETC designation for pure resellers was proper since it would prevent double recovery of universal service support payments "because they [pure resellers] would recover the support incorporated into the wholesale price of the resold service in addition to receiving universal service support directly from the federal universal service mechanisms."[10]

C. Forbearance Standard

Section 10(a) of the Act requires that the Commission forbear from applying any regulation or any provision of the Act to any telecommunications carrier if the Commission determines that:

> (1) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory;
>
> (2) enforcement of such regulation or provision is not necessary for the protection of consumers; and,
>
> (3) forbearance from applying such provision or regulation is consistent with the public interest.[11]

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8 *See* 47 U.S.C. § 214(e)(1)(A).

9 *1997 Order* at 8866.

10 *Id.* at 8876.

11 47 U.S.C. § 160(a).

In making the public interest determination required by section 10(a)(3) above, the Commission must consider "whether forbearance ... will promote competitive market conditions."[12] Any determination by the Commission that forbearance will promote competition among providers of telecommunications services may be the basis for a Commission finding that forbearance is in the public interest. Forbearance is warranted only when all three factors of the analysis are satisfied.

D. Tracfone Petition for Forbearance

In 2005, the Commission granted a petition for forbearance filed by Tracfone Wireless, Inc. ("Tracfone") from the section 214(e)(1)(A) facilities-based requirement.[13] Like Virgin Mobile, Tracfone is an MVNO that provides nationwide prepaid wireless services. In approving Tracfone's request for forbearance, the Commission concluded that the company had satisfied the three requirements of section 10(a) and that "the facilities requirement [of section 214(e)(1)(A)] impedes greater utilization of Lifeline-supported services provided by a pure wireless reseller."[14] The Commission further reasoned that low-income consumers would substantially benefit from the increased availability of prepaid wireless services since these services "may be an attractive alternative for such consumers who need the mobility, security, and convenience of a wireless phone but who are concerned about usage charges or long-term contracts."[15]

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12 47 U.S.C. § 160(b).

13 *See In the Matter of Federal-State Joint Board on Universal Service, Petition of Tracfone Wireless, Inc. for Forbearance from 47 U.S.C. § 214(e)(1)(A) and 47 C.F.R. § 54.201(i)*, Order, 20 FCC Rcd 15095 (2005)("*Tracfone Order*").

14 *Id.* at 15100.

15 *Id.* at 15101.

With respect to the first prong of the section 10(a) analysis, the Commission decided that enforcement of the facilities-based requirement was not necessary to ensure that Tracfone's charges, practices, and classifications remained just, reasonable and non-discriminatory. In making this determination, the Commission judged its prior concerns regarding double recovery of universal service support by pure resellers inapplicable to wireless resellers providing only low-income services because they do not purchase supported services for pass through to their customers. Since support is distributed on a per-customer basis, and directly reflected in the price a customer pays, the Commission maintained that the underlying carrier would not receive any support for that customer to pass on to the reseller.[16]

The Commission also determined that Tracfone's forbearance request satisfied the second and third components of the section 10(a) analysis since enforcement of the facilities requirement was not necessary for the protection of consumers and was not consistent with the public interest. The Commission decided that forbearance from the facilities requirement actually would benefit consumers since a grant of forbearance would provide eligible consumers a choice of providers and further the Act's goals of advancing the deployment of telecommunications services to low-income customers.[17] Of particular importance, the Commission concluded that granting Tracfone's request would serve the public interest by raising awareness of the USF's low-income program and expanding the participation of qualifying consumers.

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16 *See id.*

17 *See id* at 15104-15105.

## III. ANALYSIS

### A. Virgin Mobile's Petition for Forbearance Satisfies the Commission's Waiver Standard and Is in the Public Interest

#### 1. Enforcement of Section 214(e)(1)(A) Is Not Necessary to Ensure that Virgin Mobile's Rates Are Just and Reasonable and Non-Discriminatory

Section 10(a)(1) of the Act directs the Commission first to determine whether enforcement of the specific regulation at issue "is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory."[18] Given the extremely competitive state of the wireless industry, enforcement of section 214(e)(1)(A) is unnecessary to ensure that Virgin Mobile's rates are just and reasonable. In the *Tracfone Order*, the Commission concluded that the vigorous competition in the wireless market would "ensure[] that [Tracfone's] rates are just and reasonable and not unjustly or unreasonably discriminatory."[19] In the two years since issuance of that decision, competition in the wireless market has only increased as carriers, including Virgin Mobile, vigorously differentiate their service offerings from the myriad of available alternatives. Indeed, Virgin Mobile competes intensely against a host of other wireless carriers, including prepaid and postpaid providers and resellers and facilities-based providers alike. As it did in the *Tracfone Order*, the Commission should find that the existence of this robust competition ensures that enforcement of section 214(e)(1)(A) is unnecessary to ensure that Virgin Mobile provides its services at rates that are just and reasonable and not discriminatory.

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18 *See* 47 U.S.C. § 160(a)(1).

19 *See Tracfone Order* at 15101.

As a newer entrant in the wireless market, moreover, Virgin Mobile lacks market power in all segments of the wireless market, preventing it from imposing discriminatory or unjust rates. The Commission has rightly (and repeatedly) concluded that it is "'highly unlikely'" that carriers lacking market power could successfully charge rates that violate the Communications Act because an attempt to do so would prompt their customers to switch to different carriers."[20] The Commission also has consistently determined that carriers lacking market power cannot engage in unjust or discriminatory practices against their customers because "market forces will generally ensure that the rates, practices, and classifications of … carriers [that lack market power] … are just and reasonable and not unjustly or unreasonably discriminatory."[21] The competitive state of the wireless market similarly prevents Virgin Mobile from attempting to impose discriminatory or unjust rates—particularly because Virgin Mobile does not require long-term commitments, and customers may select a competitive product or service at any time.

### 2. Enforcement of Section 214(e)(1)(A) Is Not Necessary to Protect Consumers

Application of Section 214(e)(1)(A)'s facilities-based requirement to Virgin Mobile is not necessary to protect consumers. Virgin Mobile's request for forbearance must be examined in light of the Act's goals of providing low-income consumers with access to telecommunications services. The primary purpose of universal service is to ensure that consumers—especially low-income consumers—receive affordable and comparable telecommunications services. Given this context, granting forbearance to Virgin Mobile actually

[20] *In the Matter of Hyperion Telecommunications, Inc. Petition Requesting Forbearance*, 12 FCC Rcd 8596, 8600 (1997); *In the Matters of Bell Operating Companies Petitions for Forbearance from the Application of Section 272*, 13 FCC Rcd 2627, 2644 (1998); *In the Matter of Policies and Rules Concerning the Interstate, Interexchange Marketplace,* 11 FCC Rcd 20730, 20743 (1996)("*IXC Forbearance Order*"); *In the Matter of Implementation of Sections 3(n) and 332 of the Communications Act*, 9 FCC Rcd 1411, 1478 (1994).

[21] *IXC Forbearance Order*, 11 FCC Rcd at 20743.

would benefit consumers, especially its many low-income consumers eligible for Lifeline/Link-Up services. Virgin Mobile's participation in the Lifeline/Link-Up program would increase opportunities for the company to serve these customers with appealing and affordable service offerings. Forbearance also will promote competition and increase the pressures on other carriers to target low-income consumers with service offerings tailored to their needs, greatly benefiting this much ignored consumer segment. As the Commission found in the *Tracfone Order*, forbearance for Virgin Mobile to participate in the low-income program would greatly benefit low-income consumers since it would offer eligible consumers "a choice of providers not available to such consumers today for accessing telecommunications services."[22]

Virgin Mobile's request also will not unduly burden the USF or otherwise reduce the amount of funding available to other ETCs. The secondary role of Lifeline/Link-Up support with respect to overall USF expenditures is well documented. According to the Joint-Board's most recent monitoring report, Lifeline/Link-Up funding totaled approximately $800 million in 2005 while high-cost program expenditures amounted to approximately $4 billion—five times the amount of Lifeline/Link-Up funding.[23] Although many parties have raised concerns over the growth in the USF's high-cost program, the Lifeline/Link-Up program has triggered no similar outcry. Virgin Mobile understands the concerns over growth in high-cost expenditures and has participated in the Commission's proceedings addressing these issues.[24] In fact, Virgin Mobile opposed Tracfone's original request for ETC designation for participation in the high-cost program based on concerns over the unrestrained growth in the high-cost fund and the

22 *Tracfone Order* at 15101.

23 *See Universal Service Monitoring Report*, CC Docket 98-202, Tables 2.2 and 3.1 (filed Dec. 29, 2006).

24 *See Virgin Mobile ex parte*, CC Docket 96-45 (filed March 4, 2005).

concomitant demands on the USF contribution factor. Tracfone's amendment to its forbearance request limiting its ETC designation for participation only in the Lifeline program raised no similar issues, resolving Virgin Mobile's concerns with Tracfone's original request.

Addressing funding concerns in the *Tracfone Order*, the Commission concluded that grant of forbearance to Tracfone would not "significantly burden the universal service fund and thus negatively affect consumers through increased pass-through charges of the carriers' [USF] contribution obligations."[25] Describing the increased costs as "minimal," the Commission also rejected opponents' concerns that Tracfone's forbearance request would overwhelm the program to the detriment of all consumers. The Commission should likewise find that grant of forbearance to Virgin Mobile to receive Lifeline/Link-Up funding will not increase costs or overall USF expenditures in any meaningful way, and instead will benefit the many low-income customers who do not currently participate in the Lifeline/Link-Up program.

3. Forbearance Is in the Public Interest

The final forbearance factor set out in section 10(a)(3) directs the Commission to determine whether enforcement of the section 214(e)(1)(A) facilities requirement "is not in the public interest." One of the principal goals of the Act, as amended by the Telecommunications Act of 1996 is "to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies" to all citizens, regardless of geographic location or income.[26] There is no question that forbearance will further the public interest by providing consumers, especially low-income Lifeline/Link-Up consumers, with lower prices and higher quality services. Many low-income

[25] *Tracfone Order* at 15103.

[26] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56.

customers have yet to reap the full benefits of the intensely competitive wireless market. Whether because of financial constraints, poor credit history, or intermittent employment, these consumers often lack the countless choices available to most consumers. Granting Virgin Mobile forbearance from the section 214(e)(1)(A) facilities requirement, therefore, will enable it to expand the availability of affordable telecommunications services to these consumers leading to lower prices and increased choice.[27]

That forbearance will promote competitive market conditions in the wireless market also is unquestioned. Virgin Mobile will bring the same entrepreneurial spirit that has reinvigorated the wireless industry to the Lifeline/Link-Up market, helping to redefine the wireless experience for many low-income consumers. Failure by the Commission to forbear from enforcement of the facilities requirement, however, could potentially harm low-income consumers by precluding the further deployment of innovative wireless services. Believing that "more can be done to further expand participation to those subscribers that qualify [for Lifeline] and thus further the statutory goal of section 254(b)," the Commission granted Tracfone's forbearance request since it concluded that participation of wireless resellers in the low-income program would further increase participation by qualifying consumers.[28]

Finally, while Virgin Mobile has experienced success in deploying wireless services to low-income consumers, internal company analysis suggests that many low-income customers still intermittently discontinue service because of economic constraints. ETC designation would enable Virgin Mobile to offer appealing and affordable service offerings to these customers to ensure that they are able to afford uninterrupted wireless service. Providing Virgin Mobile with

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27. *See IXC Forbearance Order*, 11 FCC Rcd at 20760.

28. *Tracfone Order* at 15105.

the authority necessary to offer discounted Lifeline/Link-Up services to those most in danger of losing wireless service altogether undoubtedly promotes the public interest.

## IV. CONCLUSION

As discussed above, Virgin Mobile's request for forbearance satisfies the requirements of section 10(a) of the Act since it seeks forbearance from the requirements of section 214(e)(1)(A) only for purposes of participation in the USF's Lifeline/Link-Up program. Grant of forbearance would enable Virgin Mobile to advance the deployment of discounted telecommunications services to its low-income customers. Prompt Commission action also will ensure that Virgin Mobile expeditiously deploys its Lifeline/Link-Up services to the many low-income consumers that currently lack access to comparable and affordable telecommunications services.

WHEREFORE, for all of the foregoing reasons, Virgin Mobile respectfully requests that the Commission forbear from applying section 214(e)(1)(A) to its request for designation as an ETC.

Respectfully submitted,

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